

APR 14 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1422

Joseph F. Shanahan, Appellant

IN THE MATTER OF OSCAR W. RITTEN-
HOUSE, Prosecutor of Hunterdon
County for the Appointment of
Additional Personnel and Estab-
lishing Salary Levels in the
Hunterdon County Prosecutor's
Office

ON APPEAL FROM THE NEW JERSEY SUPERIOR
COURT, APPELLATE DIVISION

JURISDICTIONAL STATEMENT

Joseph F. Shanahan
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Date: 14 April 1977

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IN THE
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October Term, 1976

No.

Joseph F. Shanahan, Appellant

IN THE MATTER OF OSCAR W. RITTENHOUSE,
Prosecutor of Hunterdon County for the
Appointment of Additional Personnel
and Establishing Salary Levels in the
Hunterdon County Prosecutor's Office

ON APPEAL FROM THE NEW JERSEY SUPERIOR
COURT, APPELLATE DIVISION

JURISDICTIONAL STATEMENT

Appellant appeals from the final
judgement of the New Jersey Superior
Court, Appellate Division dated 9 Novem-
ber 1976 affirming the decision of the
Assignment Judge of the Superior Court
of Hunterdon County acting as legislative
agent dated 31 March 1976 and submit this
Statement to show that the Supreme Court
of the United States has jurisdiction of
the appeal and that a substantial ques-
tion is presented.

OPINIONS BELOW

The orders of the Supreme Court of

New Jersey dismissing the appeal and denying petition for certification, both dated 18 January 1977 appear in the Appendix hereto at Appendix A and B.

The decision of the Superior Court of New Jersey, Appellate Division dated 9 November 1976 appears in the Appendix hereto at Appendix C.

The letter opinion of the Assignment Judge of the Superior Court of New Jersey, Hunterdon County dated 31 March 1976 appears in the Appendix hereto at Appendix D.

JURISDICTION

This suit was brought in the Superior Court of New Jersey, Appellate Division to have N.J.S.A. 2 A:158-7 declared unconstitutional as violative of the due process clause of the Fourteenth Amendment and to overrule the letter opinion of the Assignment Judge of Hunterdon County Superior Court, dated 31 March 1976. The decision of the Superior Court, Appellate Division affirming the opinion was entered on 9 November 1976 and an appeal and petition for certification to the Supreme Court of New Jersey was filed on 23 November 1976. The appeal was dismissed and petition denied on 18 January 1977. (Appendix A and B) The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by U.S.C. S.1257 (2). The following decisions sustain the

jurisdiction of the Supreme Court to review the judgement on direct appeal in this case: Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L. Ed. 873; Lawrence v. State Tax Commission, 286 U.S. 276, 282, 3, 52 S. Ct. 556, 76 L. Ed. 1102; Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459, 59 S.Ct. 622, 83 L. Ed. 921.

QUESTIONS PRESENTED

1. Does the holding of a de-novo hearing by the assignment judge of the superior court of a county - acting as legislative agent pursuant to statute (N.J.S.A. 2A:158-7) whereby he is authorized to determine whether the prosecutor's office of such county needs additional funds over and above the regular appropriation as fixed by the county board of chosen freeholders, and if so, to order the expenditure of such additional funds, violate the due process clause of the Fourteenth Amendment to the United States Constitution as it relates to the holding of a public hearing, notice and opportunity to be heard, when only the board of freeholders is noticed by an informal letter and the taxpayers and other interested persons are not given the same public notice of such hearing as is their entitlement under the current budgetary statutes as they apply to the original appropriation?

2. Does the holding of such a

hearing (1, supra) further violate the due process clause of the Fourteenth Amendment as it relates to the opportunity to be heard when,

a. The actual place of hearing is removed from the familiar confines of the county freeholder hearing room in the county seat to the awesome trappings of a superior courtroom in the State Capital (20 miles distant) and held under the strictest formal court rules which can only have the effect of chilling public participation and input?, and

b. A taxpayer, actually present at the hearing requests an opportunity to intervene in his own behalf, after having been refused as a witness by the answering counsel of the board of freeholders, and is arbitrarily denied such opportunity by the assignment judge acting as legislative agent?

STATUTES INVOLVED

The subject statute states as follows:

N.J.S.A. 2A:158-7 Expenses of Prosecutors in Enforcement of laws

"All necessary expenses incurred by the prosecutor for each county in the detection, arrest, indictment

and conviction of offenders against the laws shall, upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court or of the county court for such county, be paid by the county treasurer whenever the same shall be approved by the board of chosen freeholders of such county. The amount or amounts to be expended shall not exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county."

Above taken from Title 2A New Jersey Statutes Annotated, page 96, Ninth Volume of Administration of Civil and Criminal Justice.

OTHER RELEVANT STATUTES

40A:4-3. Annual budget

The governing body of each local unit shall adopt a budget for each fiscal year. The budget of each local unit shall be prepared on a cash basis unless otherwise permitted by law.

40A:4-4. Procedures for adoption of budget

All budgets shall be introduced,

approved, amended and adopted by resolution passed by not less than a majority of the full membership of the governing body.

The procedure shall be as follows:

- a. Introduction and approval.
- b. Public advertising
- c. Public hearing.
- d. Amendments and public hearings, if required.
- e. Adoption.

40A:4-7. Time of public hearing

No budget shall be adopted until a public hearing has been held thereon and taxpayers and all persons having an interest therein shall have been given an opportunity to present objections.

Such hearing shall be held not less than 18 days in the case of a county, and not less than 28 days in the case of a municipality, after the approval of the budget.

Above taken from Title 40A New Jersey Statutes Annotated pp. 70,72.

STATEMENT OF THE CASE

The matter arises out of the public hearing on the Hunterdon County budget held in Flemington, New Jersey on 24 Feb-

ruary 1976 by the Hunterdon County Board of Chosen Freeholders pursuant to N.J.S.A. 40A:4-7 (supra) at which time and place appellant Joseph F. Shanahan, representing the Hunterdon County Citizens and Taxpayers Association presented written objections to the original appropriation for the county prosecutor's office. On 5 March 1976 appellee prosecutor Oscar W. Rittenhouse filed a petition appealing the budget appropriation for his office as fixed by the board of chosen freeholders by letter to the clerk of the superior court, Hunterdon County pursuant to N.J.S.A. 2A:158-7 (supra) and sending copies thereof to the board. On 19 March 1976 Assignment Judge George Y. Schoch held a hearing on the matter in the superior court in Trenton, New Jersey wherein the board appeared in opposition to such petition and was represented by county counsel Edwin Large. The appellant, having read a newspaper account of the coming hearing on the preceding day also appeared at the court room prior to the hearing and presented himself to the county counsel as a witness for the board but was refused. Thereupon he attempted to intervene orally as a resident and taxpayer but was refused peremptorily by Judge Schoch without having had an opportunity to identify himself as a taxpayer and a member of the bar. On 31 March 1976 the assignment judge acting as legislative agent (Exhibit D) issued an opinion directing the board to make the necessary appropriations to cover the additional salaries and increases as sub-

mitted by the prosecutor without change. On 6 May 1976 appellant filed a notice of appeal to the Appellate Division of the Superior Court. On 16 June 1976 appellee prosecutor filed a motion to dismiss contending that appellant lacked standing. On 25 June 1976 appellant filed a brief in opposition to the motion to dismiss. On 1 July appellant filed a brief in the original appeal and in Point One thereof raised the federal constitutional question of "due process" as it related to notice and opportunity to be heard, claiming that the possible increase in his taxes resulting from the subject hearing was his direct financial interest in the matter and that it was protected as a statutory entitlement, citing Fuentes v. Shevin, 407 U.S. 67, 84, 32 L. Ed. 556, 92 S.Ct. 1983 (1971) as it relates to the "property interest" protected by the Fourteenth Amendment.

On 26 July 1976 respondent filed his answering brief. On 30 August 1976 the State Attorney General submitted a brief in answer to appellant as amicus curiae. On 4 August 1976 appellant filed a reply brief reaffirming his right to notice and opportunity to be heard under the Fourteenth Amendment and citing Londoner v. Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L. Ed. 1103 (1908). The decision of the Appellate Division was published on 9 November 1976 (Exhibit C) affirming the opinion of the Assignment Judge but not ruling on the issue of standing. Appellant filed a notice of appeal and petition

for certification to the supreme court of New Jersey on 23 November 1976 and filed such petition on 2 December. Appellee prosecutor did not respond to above but requested Attorney General to do so, who moved to dismiss by letter of 9 December 1976. Appellant filed a reply brief in support of certification on 20 December. On 23 December the Attorney General (amicus curiae) filed a brief in support of State's motion to strike from appellant's brief. On 3 January 1977 appellant filed brief in opposition to motion to strike. On 18 January 1977 the supreme court dismissed the appeal and denied the petition for certification.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are similar to those raised in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970) in which persons receiving financial aid under the federally assisted program of Aid to Families with Dependent Children or under New York State's Home Relief Program complained that the city and state officials administering the programs terminated such aid without prior notice and hearing thereby denying them due process of law. It was held that "Such benefits are a matter of statutory entitlement for persons qualified to receive them." *supra*, at 262.

1. In the instant case, the procedures for the budget making and the tax

raising authority of all the counties and municipalities in the State of New Jersey are governed by and delegated by the Local Budget Law, (N.J.S.A. 40A:4-2 et seq.) with N.J.S.A. 40A:4-10 concluding with:

"Upon adoption, the budget shall constitute an appropriation for the purposes stated therein and an authorization of the amount to be raised by taxation ..."

Therefore, the adoption of the annual budget constitutes the official appropriation and the statutory authority for the amount to be raised by county taxation and the last opportunity that a taxpayer has to present objection thereto. So, when the assignment judge of such county orders amounts in excess of those appropriations approved by the Board of Freeholders (pursuant to N.J.S.A. 2A:158-7 and interpreted by case law) to be included in that budget he is, in effect, ordering an increase in the amount to be raised by taxation which necessarily affects the property interest of appellant and all other county property taxpayers who must bear that additional tax burden which is capable of being computed exactly. And even though it is divided among thousands it is an injury which cannot be considered as trifling. An interest that has sufficed for standing in the Supreme Court includes a poll tax of \$1.50. Harper v. Virginia Board of Elections 383

U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 169 (1966).

In addition, the budget procedures as set forth in N.J.S.A. 40A:4-7 (supra) confer on local taxpayers and all persons having an interest in the annual budget the right to a public hearing with a guarantee of public notice and the opportunity to present objections thereto. But if, after the budget has been adopted according to the statutory procedure as set forth, it can be augmented at the discretion of the prosecutor by petition to the local assignment judge who, after holding a de novo fact finding hearing concerning these proposed additional appropriations, without affording the local citizenry the right to notice and to object thereto, as provided by statute for the original appropriation, and in fact, precluding the introduction of any input into the fact finding by a taxpayer actually present at such hearing, it is the contention of the appellant that such procedure violates the due process clause of the Fourteenth Amendment as it relates to the statutory right of a citizen of the United States to notice and an opportunity to be heard. It is the further contention of the appellant that it also distorts and circumvents the intention of the legislature as it pertains to application of the entire budget making process on a statewide basis in favor of a comparatively obscure statute in a limited area, and therefore does present a substantial question to this Court.

2. The authority of the assignment judge of the superior court of the county to order such additional expenditures is based on the final sentence of the statute in question (N.J.S.A. 2A:158-7) which states:

"The amount or amounts to be expended shall not exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county."

It should be noted that the above sentence structure has as the principle clause, the affirmation of the amounts to be expended as those fixed by the board of freeholders while the subordinate clause designates the authority of the assignment judge. This, grammatically and logically would seem to indicate that the authority of the latter is intended to be in general conformity with the budget procedures as taken as a whole and impliedly includes the right of the citizenry to public notice, a hearing and an opportunity to present objection. It certainly does not specifically exclude such right as the instant case would seem to hold.

The developing case law on the statute has interpreted the authority of the

assignment judge to be:

- a. that he "... is required to make his own original evaluation of the prosecutor's request." In Re Application of Bigley, 55 N.J. 53,57 (1969)
- b. that "...; the statute constitutes him a legislative agent." Bigley, supra at 57
- c. that he "..., continues to have the final and conclusive authority to approve expenditures beyond the appropriations." Bigley, supra at 59

It is the contention of the appellant that the above interpretation of the statute which grants such arbitrary power to an appointed official to preempt the tax raising authority of an elected governing body without limitation is arbitrary, capricious and beyond the meaning of the language of the statute.

3. As a further example of the developing case law on this matter, to the disadvantage of the individual's basic rights, the appellee prosecutor has contended in his brief that the appellant,

"..., has no right to notice of the hearing, no right to be heard at the hearing, nor any

right to intervene or to appeal from the ruling below absent a showing of collusion, bad faith or gross negligence on the part of the Board of Chosen Freeholders." (Rb16-16-20)

apparently basing his authority for such statement on the language expressed by the court in Bigley, supra at 61:

"...., it is appropriate that the prosecutor give notice to the freeholders of his application before the Assignment Judge so that the freeholders may communicate their views."


There appears to be no basis for such an excessively repressive and all encompassing contention either in the statute or in the above language of the court, particularly where appellant is statutorily entitled to all those rights in the hearing on the original appropriation. This contention, if allowed to stand with the apparent approval of the court, as it seems to be, may also become law and erode the rights of individual taxpayers even more. It would seem to be pertinent at this time to cite the following statement of the court in Fagan v. State Board of Assessors 80 N.J. L. 516, 518 (1910) relative to the rights of citizens and taxpayers in general, and in particular to the right of a citizen to inspect certain railroad schedules:

"As a citizen and a taxpayer he has that abiding interest in the administration of his government and of every department of it that affects him or his fellows that marks the difference between a citizen and a subject. It is to the failure of the citizen to assert these rights that we must look for those evils that are incident to our form of government rather than to a superabundant zeal in this respect."

(underline added)

CONCLUSION

It is submitted that the decision of the Superior Court of New Jersey, Appellate Division dated 9 November 1976 affirming the letter opinion of the Superior Court, Hunterdon County dated 3 March 1976 failed to recognize the applicability of the due process clause of the Fourteenth Amendment to the instant case. Appellant believes that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

Joseph F. Shanahan, Esq.
R.D. 2, Lambertville,
N.J. 08530

Dated 14 April 1977

APPENDIX A

SUPREME COURT OF NEW JERSEY

M-398 SEPTEMBER TERM 1976

IN THE MATTER OF :
OSCAR W. RITTEN- :
HOUSE, PROSECUTOR :
OF HUNTERDON COUNTY, :
etc., : ORDER
: :
:

This matter having been duly presented to the Court, it is ORDERED that the motion of the Attorney General to dismiss the appeal is granted.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 18th day of January, 1977.

Florence R. Peskoe
Clerk

FILED
JAN 18 1977
Florence R. Peskoe
Clerk

APPENDIX B

SUPREME COURT OF NEW JERSEY
C-437 SEPTEMBER TERM 1976

IN THE MATTER OF :
OSCAR W. RITTEN- :
HOUSE, PROSECUTOR :
OF HUNTERDON COUNTY, : ON PETITION FOR
etc., : CERTIFICATION
: :
:

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 18th day of January, 1977.

Florence R. Peskoe
Clerk

FILED
JAN 18 1977
Florence R. Peskoe
Clerk

APPENDIX C
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3224-75

IN THE MATTER OF
OSCAR W. RITTEN-
HOUSE, PROSECUTOR
of Hunterdon County
for the Appointment
of Additional Per-
sonnel and Establish-
ing Salary Levels in
the Hunterdon County
Prosecutor's Office,

JOSEPH F. SHANAHAN,

Appellant.

Argued October 25, 1976 -- Decided
Nov. 9, 1976.

Before Judges Fritz, Crahay and Ard.

On appeal from Assignment Judge's
Order

Pursuant to N.J.S.A. 2A:158-7, Su-
perior Court, Law Division, Hunter-
don County.

Mr. Joseph F. Shanahan argued the
cause for appellant pro se.

Mr. Oscar W. Rittenhouse, Hunterdon
County Prosecutor, argued the cause
for respondent (Mr. Neil S. Cooper,
First Assistant Prosecutor, on the
brief).

Ms. Ileana N. Saros, Deputy Attorney
General, argued the cause Amicus
Curiae (Mr. William F. Hyland, At-
torney General of New Jersey, at-
torney).

PER CURIAM

On the petition of the Hunterdon
County Prosecutor, brought pursuant to
N.J.S.A. 2A:158-7, Assignment Judge
George Y. Schoch, following a hearing,
entered an order increasing the auth-
orized strength of the prosecutor's of-
fice and directing the Hunterdon County
Board of Chosen Freeholders to make ap-
propriate budgetary provisions to sup-
port the enlargement. (On June 15, 1976
we stayed the operation of the order.)
The Board of Freeholders does not appeal.
Appellant, a taxpayer in the county, has
appealed and essentially asserts that -

1) the hearing before the Assign-
ment Judge was violative of due process
requirements;

2) N.J.S.A. 2A:158-7 is unconsti-
tutional in that it attempts to delegate
the taxing powers of the Legislature to
the judicial branch; and

3) N.J.S.A. 2A:158-7 has been repealed by N.J.S.A. 40A:4-1 et seq. - the "Local Budget Law".

At the outset respondent prosecutor and amicus Attorney General contend that appellant, as a taxpayer and not having been a party below, lacks standing to challenge the trial court's order. In view of our disposition we need not address this threshold question.

Our review of the entire record satisfies us that the order had ample record support and was entirely appropriate. We perceive no merit in appellant's various arguments warranting reversal and affirm substantially for the reasons expressed by Judge Schoch in his letter opinion filed in the Law Division.

Affirmed. The stay heretofore ordered is vacated.

Elizabeth McLaughlin
Clerk

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

March 31, 1976

Prosecutor Oscar W. Rittenhouse
Hunterdon County
8 Court Street
Flemington, New Jersey 08822

Edwin K. Large, Jr., Esq.
Hunterdon County Counsel
117 Main Street
Flemington, New Jersey 08822

Re: In the matter of the Application of
Oscar W. Rittenhouse, Prosecutor of
Hunterdon County, for the Appoint-
ment of Additional Personnel and
Establishing of Salary Levels in
the Hunterdon County Prosecutor's
Office

Gentlemen:

In my capacity as Assignment Judge of the Superior Court of New Jersey, Hunterdon County, the Prosecutor of Hunterdon County has submitted a Petition to me, requesting that I establish the number of legal and supportive personnel required to man the Prosecutor's Office, and for an order directing the Freeholders of Hunterdon County to appro-

priate the necessary funds to pay the salaries of those persons so employed.

The authority of the Assignment Judge to hear and determine such a Petition is contained in N.J.S. 2A:158-7, as follows:

"All necessary expenses incurred by the prosecutor for each county in the detection, arrest, indictment and conviction of offenders against the laws shall, upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court or of the county court for such county, be paid by the county treasurer whenever the same shall be approved by the board of chosen freeholders of such county. The amount or amounts to be expended shall not exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county."

(emphasis added)

Under that statute, the Assignment Judge acts as a legislative agent rather than as a judicial officer, and the constitutionality of this transposition has been previously challenged and upheld. In Re Application of Bigley, 55 N.J. 53

(1969); In Re Application of Schragger, 58 N.J. 274 (1971). As was said in Bigley, supra:

"It should be stressed that the statute does not call upon the judicial officer to sit in review of the action or inaction of the board of freeholders. On the contrary, the judicial officer is required to make his own original evaluation of the prosecutor's request. Thus the judge does not exercise the judicial power of his office; the statute constitutes him a legislative agent...(W)e emphasize that the judge exercises a delegated legislative function and that in doing so he must decide what ought to be rather than whether the action or inaction of the board of freeholders was arbitrary or unreasonable." at p. 57.

I turn now to a consideration of the merits of the application. A hearing was held on this Petition on March 19 at which time I heard testimony by Deputy Attorney General Clinton Cronin, Prosecutor Rittenhouse, and Freeholders Benjamin B. Kirkland and George D. Miller. In addition, several pieces of documentary evidence were received and admitted.

Mr. Cronin, who is Chief of the Prosecutor's Supervisory Section of the Division of Criminal Justice in the office of the Attorney General, testified to his background in law enforcement work and then outlined the various factors he considered in preparing a survey of the Hunterdon County Prosecutor's Office, and his opinion of the needs of that office. In the survey, marked P-1 in evidence, he sets forth 14 different areas of "required functions" which are common to all prosecutor offices and he then describes several areas which are just developing and will require the attention of the prosecutor's office or which have been neglected in the past because of the part-time status of the prosecutor and assistants prior to August 15, 1975. Among these are the "Sunshine Act", the developing emphasis on speedy trials, the "Title IV" Program, and the PTI Program which will be instituted in the near future. He further pointed out that the Office of the Prosecutor, while on part-time status, did not have the opportunity to engage in the education of local police departments, the extradition of fugitives was not pursued as diligently as it should have been because of the lack of manpower, the expanded use of the Clinton Reformatory as a prison for males will create more problems for the Prosecutor. He also produced a comparison of prosecutorial staffs in the several counties of the state and a salary survey. Based

on all these factors, he arrived at the conclusion that the Prosecutor's Office requires another assistant prosecutor, two more investigators and another stenographer.

Prosecutor Rittenhouse, who was appointed as full-time Prosecutor on August 15, 1975, then testified. He related his experience as a part-time Prosecutor for some 5½ years from September, 1967 to February, 1973, so it was obvious that he has considerable knowledge of the functions of the office and the problems involved. In the Court's opinion, he was a most articulate and persuasive witness, clearly giving the impression that he knows and appreciates the responsibilities of the office and that he intends to face those responsibilities and fulfill the duties of the office to the best of his ability.

He discussed the so-called "normal" duties of the Prosecutor to present cases to the Grand Jury and to prepare and try cases, and then elaborated on what he considers the other functions of the Prosecutor to be, functions that are a necessary part of his duties but which the general public is generally unaware of. He talked about the necessity of the Prosecutor's Office to become more involved in community matters, he emphasized the necessity for greater cooperation between the Prosecutor's Office and the various local police departments, the necessity for educating

the local police especially with the prospective withdrawal of State Police assistance, he envisions one assistant prosecutor being available to direct investigations of serious crimes and of having the Prosecutor's Office assume supervision of serious cases from the beginning. He further considers it essential that the legal staff maintain a schedule of further education to increase their skills and their value to their office and the county.

He then described the number of people who comprised the Prosecutor's Office during the part-time era, demonstrating that there has been no change in the investigative staff in the past five years and that the legal staff started out with a prosecutor and 2 assistants and then another assistant was added, all of them being part time. He testified that the present backlog of criminal cases amounts to some 240 cases awaiting trial and another 250 cases awaiting Grand Jury action.

Finally, he testified that, in his opinion, in order to operate the Prosecutor's Office in a manner to comply with the statutory responsibilities of the office he required another assistant prosecutor, 2 investigators and a clerk-stenographer. He further testified about his commitment to First Assistant Cooper regarding salary increases, although conceding that this arrangement had not been cleared with

the Freeholders. Nevertheless, he expounded on the ability of Mr. Cooper and requested that the salary for the first assistant be increased by \$2500 rather than the \$1000 allowed in the present budget. He further requested an additional \$500 for the chief and for the lieutenant of detectives.

Testimony of the Freeholders was directed to the comparison of certain statistics. It was pointed out that the population of the county in some five years has increased only 6.8% to about 74,000 persons while the budget for the Prosecutor's Office has increased 150% from 1973 to 1976. The Court finds these figures to be of minimal significance; these numbers ignore several factors, among them the increase in crime in the county, the inflationary cost of living index, the changeover from part-time to full-time status of the office, and most importantly, the present professional approach to the statutory mandates of the Legislature and the duties of the office.

From the evidence presented to me, I find that there is clearly a present and urgent need for the additional personnel requested in order for the Prosecutor's Office to reach and maintain the high standards that the Prosecutor requires and that the county is entitled to expect. Therefore, the Court will grant the following relief. The Prosecutor shall be authorized to hire another

assistant prosecutor at a salary of \$17,500, an investigator at a salary of \$15,000, and administrative investigator at a salary of \$12,000, and a clerk-stenographer at a salary to be fixed by the county at a level commensurate with the duties and equivalent to that received by other county personnel in a similar position. The Court has considered the testimony regarding the background and expertise of First Assistant Prosecutor Cooper and determines that the agreement made by the Prosecutor is justified and should be complied with, and directs that the salary for the First Assistant Prosecutor for the year 1976 be fixed at \$29,500. The Court has considered the request for additional increases for the Chief of Detectives and Lieutenant of Detectives and finds the requests justified for 2 reasons: first, the Prosecutor should be permitted to establish differentials within the department in accordance with his analysis of the experience and ability of the individuals, and second, a comparison with salaries paid throughout the State shows that the requested salaries of \$20,000 for Chief and \$18,000 for the Lieutenant will bring them more in line with the prevailing rate.

An appropriate Order directing the Board of Freeholders to make the necessary appropriation to cover the foregoing salaries and increases should be submit-

ted by the Prosecutor.

Very truly yours,

George Y. Schoch,
A.J.S.C.

GYS:mt

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE
OF NEW JERSEY, APPELLATE DIVISION

IN THE MATTER OF OSCAR W.
RITTENHOUSE Prosecutor of
Hunterdon County for the
Appointment of Additional
Personnel and Establishing
Salary Levels in the Hun-
terdon County Prosecutor's
Office


No. A-3224-75

JOSEPH F. SHANAHAN
Appellant

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES


Notice is hereby given that Joseph F. Shanahan of RD 2, Lambertville, New Jersey, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Superior Court of New Jersey, Appellate Division affirming the decision of the Assignment Judge of the Superior Court, Hunterdon County acting as legislative agent entered in this action on 31 March 1976.

This appeal is taken pursuant to 28 U.S.C.S. 1257 (2).


Joseph F. Shanahan
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April 1977 that this Notice of Appeal was filed in the Superior Court of New Jersey, Appellate Division and one copy each was delivered to the office of Oscar W. Rittenhouse, Prosecutor of Hunterdon County, 8 Court Street, Flemington, N.J. 08822 and to the office of William F. Hyland, Attorney General of New Jersey (amicus curiae) State House Annex, Trenton, New Jersey 08625.


Joseph F. Shanahan, Esq.
Attorney for Appellants
R.D. 2, Lambertville,
N.J. 08530

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April 1977 three copies of the Jurisdictional Statement were delivered to the office of Oscar W. Rittenhouse, Prosecutor of Hunterdon County, 8 Court Street, Flemington, New Jersey 08822 and three copies to William F. Hyland, Esquire, Attorney General of New Jersey, State House Annex, Trenton, N.J. 08625 (Amicus Curiae).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1422

JOSEPH F. SHANAHAN,
Appellant,

v.

OSCAR W. RITTENHOUSE, etc.,
Appellee.

**On Appeal from the New Jersey Superior Court,
Appellate Division**

MOTION TO DISMISS OR AFFIRM

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On the Motion.

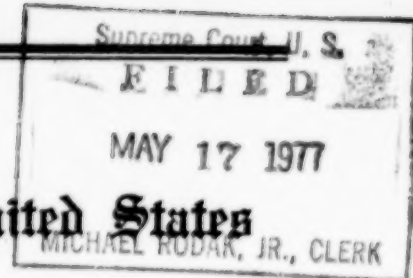


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IN THE

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OCTOBER TERM, 1976

No. 76-1422

JOSEPH F. SHANAHAN,

*Appellant,**v.*

OSCAR W. RITTENHOUSE, etc.,

Appellee.

On Appeal from the New Jersey Superior Court,
Appellate Division

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the New Jersey Superior Court, Appellate Division, on the grounds that the judgment rests on an adequate non-federal basis and that it does not present a substantial federal question.

I.

The Statute Involved and the Nature of the Case**A. The Statute**

This appeal raises the question of the validity of a provision of N.J.S.A. 2A:158-7 (New Jersey Statutes Annotated, Title 2A, Administration of Civil and Criminal Justice, §2A:158-7, "Expenses of prosecutors in enforcement of laws").

The challenged provision of the statute empowers the assignment judge of the superior court for a county to authorize by order the expenditure of necessary expenses incurred by the prosecutor for said county, which expenses exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation.¹

¹ The statute reads:

All necessary expenses incurred by the prosecutor for each county in the detection, arrest, indictment and conviction of offenders against the laws shall, upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court of the county court for such county, be paid by the county treasurer whenever the same shall be approved by the board of chosen freeholders of such county. The amount or amounts to be expended shall not exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county.

B. The Proceedings Below

On August 15, 1975, the Prosecutor's Office of Hunterdon County was converted to full time status pursuant to a statute which was passed on July 9, 1975. Appellee, Oscar W. Rittenhouse, was appointed as full time prosecutor.

By letter dated December 15, 1975, appellee submitted a budget request for 1976 for his office to the Hunterdon County Board of Chosen Freeholders (hereinafter Board). Contained therein was a request for funds to hire additional personnel and to provide salary increases for existing personnel. After conducting public hearings, the Board passed the county budget for 1976, but did not appropriate monies for appellee's request for additional personnel and salary increases for existing personnel.

On March 9, 1976, pursuant to the provisions of N.J.S.A. 2A:158-7, appellee filed a petition with the assignment judge of the Superior Court for Hunterdon County, the Honorable George Y. Schoch. He requested that the assignment judge authorize the additional expenditures. Notice of appellee's petition was served upon the Board.

On March 19, 1976, the assignment judge conducted a hearing with respect to the aforementioned petition. Appellant was present at the hearing. Following the testimony of the first witness, appellant orally requested permission to question the witness. The assignment judge referred appellant to the county counsel. After consulting with appellant, the county counsel stated that he had no further questions of the witness. Additional testimony was taken.

In a letter opinion dated March 31, 1976, the assignment judge established his jurisdiction over appellee's petition and stated that a present and urgent need existed

for the additional personnel requested by appellee and that the request for increased salaries for the present staff was justified. On April 20, 1976, the assignment judge entered an order in accordance with his opinion.

Appellant filed a notice of appeal to the Appellate Division of the Superior Court, dated May 6, 1976, from the above decision and order. He contended that (1) the hearing before the assignment judge was violative of due process requirements, (2) N.J.S.A. 2A:158-7 is an unconstitutional delegation of the taxing power of the Legislature to the judicial branch, and (3) N.J.S.A. 2A:158-7 has been repealed by N.J.S.A. 40A:4-1 *et seq.*, the "Local Budget Law."

On May 27, 1976, the time for appeal by the Board of Freeholders expired without an appeal being taken. On June 17, 1976, appellee filed a notice of motion to dismiss the appeal on the ground of lack of standing. On July 9, 1976, decision of the motion was reserved by order of the court pending oral argument and determination of the appeal.

On November 9, 1976, the Appellate Division of the Superior Court affirmed the order of the assignment judge for the reasons expressed in his opinion. The court perceived no merit in appellant's various arguments, and in view thereof, it did not address itself to the threshold question of standing.

On January 18, 1977, the Supreme Court of New Jersey denied appellant's petition for certification and granted the Attorney General's motion to dismiss appellant's appeal.

II.

ARGUMENT

A. The judgment rests on an adequate and independent non-federal ground.

Appellant, who was not a party to the proceeding before the assignment judge, prosecuted an appeal from the order of the assignment judge to the Appellate Division of the Superior Court of New Jersey. He urged, *inter alia*, that the hearing was violative of his right to due process under the Federal Constitution. This was the first instance in the proceedings that a federal question was raised. The Appellate Division of the Superior Court affirmed the order:

Our review of the entire record satisfies us that the order had ample record support and was entirely appropriate. We perceive no merit in appellant's various arguments warranting reversal and affirm substantially for the reasons expressed by Judge Schoch in his letter opinion filed in the Law Division.

In his letter opinion, the assignment judge established his authority to act as a legislative agent, rather than as a judicial officer, and to make an original evaluation of the prosecutor's application for additional monies. He relied upon the New Jersey Supreme Court's decisions in *In re Application of Bigley*, 55 N.J. 53, 259 A.2d 213 (Sup. Ct. 1969), and *In re Application of Schragger*, 58 N.J. 274, 277 A.2d 212 (Sup. Ct. 1971), which case reaffirmed the *Bigley* holding. The assignment judge then reviewed the testimony of the witnesses at the hearing before him and granted the relief sought by the prosecutor. There was no federal question raised before the assignment judge.

The state court's decision was based entirely upon the New Jersey Supreme Court's construction of the statute, viz. the assignment judge is constituted a legislative agent with final and conclusive authority to evaluate and determine the ultimate monetary requirements of the prosecutor. The federal question raised by appellant was perceived as having no merit. The court found adequate support in the record for the assignment judge's order.

B. The case does not present a substantial federal question.

The questions presented by appellant are wholly formal. When examined with reference to the averments of fact upon which the questions were made to depend, they are so absolutely devoid of merit as to be frivolous.

(i)

The Supreme Court on appeal must accept the state court's construction of the statute and proceed to test its validity on that basis. *Kingsley Pictures v. Regents*, 360 U.S. 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). The New Jersey Supreme Court has interpreted the pertinent language of the statute in *In re Application of Bigley*, 55 N.J. 53, 259 A.2d 213 (Sup. Ct. 1969). It was held that under the statute, the assignment judge acts as a legislative agent with the duty to make an original evaluation of the ultimate monetary needs of the prosecutor. The determination of the assignment judge is final and conclusive. *Id.*, 55 N.J. at 57, 59, 259 A.2d at 214-215, 216. With respect to notice, the court construed the statute as requiring the prosecutor to provide the county board of chosen freeholders with notice of his application to the assignment judge. *Id.*, 55 N.J. at 61, 259 A.2d at 217. The court held that the freeholders "do speak for the taxpayers who must meet the

added charge, and it therefore is appropriate, notwithstanding the absence of a legislative mandate, that the prosecutor make an initial request of the freeholders unless circumstances excuse that course." *Id.*

The requirement of notice to the county board of chosen freeholders satisfies due process. Representation by the appropriate public body is deemed adequate to protect the interest of the resident taxpayers in the absence of gross negligence, collusion or bad faith on the part of such public body. *Mitchell v. City of Nogales*, 83 Ariz. 328, 320 P. 2d 955, 957 (Sup. Ct. 1958); *City of Cincinnati v. Kellogg*, 92 N.E. 2d 609, 611-612 (Ohio App. Ct. 1949), aff'd 91 N.E. 2d 505 (Ohio Sup. Ct. 1950); 84 ALR 2d 1412, Anno: Intervention as a Matter of Right, §41, pp. 1451-1452; 74 Am. Jur. 2d Taxpayers' Actions §47, pp. 259-260. See *Mackey v. City of Little Rock*, 94 F.2d 546, 549 (8 Cir. 1938), cert. den. 304 U.S. 582 (1938). To permit the participation of a taxpayer in a matter to which a public body is a party and which concerns the rights of taxpayers generally would allow the county, in effect, to have two attorneys of record. See *Middlesex Concrete, etc., Corp. v. Carteret Borough*, 27 N.J. Super. 473, 475, 99 A.2d 555, 556 (Cty. Ct. 1953). The input of the taxpayer comes initially at the public hearings held by the board on the county budget and specifically on the budget request of the prosecutor's office. It is at such hearings that the views of the taxpayers are made known. The board is thus armed to make a determination as to budget appropriations and to defend that determination before the assignment judge.

(ii)

Appellant's contention that he was "arbitrarily denied" participation in the hearing before the assignment judge is patently frivolous. He was not a party to the pro-

ceedings, but merely requested that he be permitted to question a witness. The assignment judge directed him to speak through the county counsel who represented the board of chosen freeholders. At no time had appellant utilized the vehicle of intervention as prescribed by the Rules Governing the Courts of the State of New Jersey. (Pressler, *Current N.J. Court Rules*, R. 4:33-1, 2, 3). Participation in the hearing may have been accorded appellant had he complied with the proper procedure.

III.

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and that the judgment rests on an adequate non-federal basis, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative to affirm the judgment entered in the cause by the Appellate Division of the Superior Court of New Jersey.

Respectfully submitted,

WILLIAM F. HYLAND

Attorney General of New Jersey

Attorney for Appellee

By: DAVID S. BAIME

Assistant Attorney General

DAVID S. BAIME,

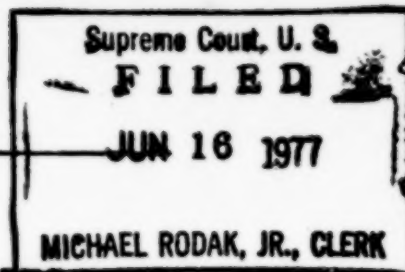
Assistant Attorney General,
Division of Criminal Justice,

Of Counsel.

ILEANA N. SAROS,

Deputy Attorney General,

On the Motion.



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1422

JOSEPH F. SHANAHAN, Appellant

v.

OSCAR W. RITTENHOUSE, Appellee

ON APPEAL FROM THE NEW JERSEY SUPERIOR
COURT, APPELLATE DIVISION

MOTION FOR LEAVE TO FILE PETITION
FOR REHEARING

JOSEPH F. SHANAHAN
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Attorney for Appellant

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1422

JOSEPH F. SHANAHAN, Appellant

v.

OSCAR W. RITTENHOUSE, Appellee

ON APPEAL FROM THE NEW JERSEY SUPERIOR
COURT, APPELLATE DIVISION

MOTION FOR LEAVE TO FILE PETITION
FOR REHEARING

Appellant respectfully moves for leave
to file the annexed petition for rehearing
of the order of the Court dismissing the

appeal in this case, entered 6 June 1977. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the argument of the appellee as set forth in his Motion to Dismiss or Affirm is supported by an erroneous paraphrasing of the record which is material to the decision of the case.

Dated 15 June 1977 Joseph F. Shanahan
Joseph F. Shanahan
Attorney for Appellant

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1422

JOSEPH F. SHANAHAN, Appellant

v.

OSCAR W. RITTENHOUSE, Appellee

ON APPEAL FROM THE NEW JERSEY SUPERIOR
COURT, APPELLATE DIVISION

PETITION FOR REHEARING OF ORDER
DISMISSING THE APPEAL

Appellant prays that this Court
grant rehearing of its order of 6 June
1977 dismissing the appeal in this case

and that the Court note probable jurisdiction in that the matter involves a substantial federal question as stated in the Jurisdictional Statement dated 14 April 1977.

REASONS FOR GRANTING REHEARING

Under sub paragraph (11) of appellee's argument II B that,

"The case does not present a substantial federal question."

(Motion to Dismiss, p.6,7)

he concludes that,

"Appellant's contention that he was 'arbitrarily denied' participation in the hearing before the assignment judge is patently frivolous."

and supports it by the following statement:

"He was not a party to the proceedings, but merely requested that he be permitted to question a witness."

(emphasis added)

The verbatim record of appellant's en-

tire participation in the hearing (copy attached as Exhibit A) negates appellee's above paraphrasing of the record that appellant "merely requested that he be permitted to question a witness." It shows appellant requesting to intervene and the Court immediately denying same. The pertinent part of the transcript is:

"Mr. Shanahan: Your Honor, would it be possible for me to intervene?"

The Court: No. If you want to ask questions consult with Mr. Large."

This is a clear misstatement of the meaning of the record and is analogous to another case where a rehearing was petitioned on the ground that there had been an imperfect record and,

"...that a large part of the matter which was before the court below had been omitted in the transcript certified to this court,..."

Ambler v. Whipple 90 U.S. 278,
282 (1874)

The court denied the rehearing because it was satisfied, "...from an examination of this additional transcript, that it was wholly immaterial to any issue in the cause."; but in so doing did state at 282 in reference to the claim of imperfect record,

"If this statement be correct, and if the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument;..."

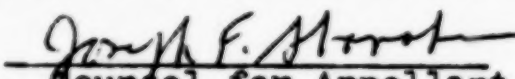
Appellant contends that the above statement misparaphrasing the record in support of appellee's argument that "The case does not present a substantial federal question." which was later adopted by the Court as its reason for dismissal of the appeal, is a material enough defect in the presentation of the facts to be as strong a basis for rehearing as the hypo-

thetical material omissions in the transcript, as stated in the above case, are for reargument. In either case due consideration of the matter by the Court would be flawed by the summary of the facts presented or the incompleteness of the record submitted,

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that rehearing be granted and that probable jurisdiction for the instant appeal be noted.

Respectfully submitted,


Counsel for Appellant

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to

grounds specified in Rule 58 of the rules of this Court.

Joseph F. Morahan
Counsel for Appellant

APPENDIX

Copy of Transcript (page 33)

EXHIBIT A

COPY OF TRANSCRIPT (PAGE 33)

Cronin-Cross

33

Mr. Shanahan: Your Honor, would it be possible for me to intervene?

The Court: No. If you want to ask questions consult with Mr. Large. He represents the county and I think that is the proper way of handling something like that. You can do it right now before Mr. Cronin leaves. Just a moment, Mr. Cronin, please. State your name.

Mr. Shanahan: My name is Joseph Shanahan. I neglected to say before I am admitted too but I am speaking here as a private taxpayer.

The Court: You are admitted to the Bar of New Jersey?

Mr. Shanahan: Yes, your Honor.

The Court: You are a resident of Hunterdon County?

Mr. Shanahan: Yes.

The Court: All right.

(Mr. Shanahan consults with Mr. Large)

Mr. Large: No more questions, your Honor.

The Court: Thank you.